Filed 5/19/14 P. v. Byrns CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDWARD PAUL BYRNS, Defendant and Appellant.	A134698 (Contra Costa County Super. Ct. No. 51014794)

After a jury found defendant Edward Paul Byrns guilty as charged of robbery felony murder involving the personal use of a firearm, he was sentenced to state prison for the prescribed term of life without the possibility of parole. On this timely appeal, defendant contends: (1) the prosecution's use of peremptory challenges to excuse two prospective jurors violated *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79; (2) the trial court erred by denying defendant's motion to suppress evidence of an improperly suggestive photographic lineup; (3) the trial court erred by allowing a witness to testify on matters beyond her expertise; (4) the prosecution's comment upon defendant's decision not to testify violated *Griffin v. California* (1965) 380 U.S. 609; (5) the trial court erred in denying defendant's pretrial motion to strike the special circumstance allegation because it was added in vindictive retaliation for defendant exercising his right to counsel of his own choice; and (6) he was erroneously assessed a parole revocation restitution fine.

Only defendant's final point has merit. However, it, and another minor sentencing error identified by the Attorney General, can be corrected without the need for a remand. Thus, after modifying the judgment to reflect those corrections, we affirm.

BACKGROUND

Defendant was convicted of the 1993 robbery and murder of bar owner Louis Fernandez. Viewed most favorably in support of the judgment (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence may be summarized as follows:

Barry Fisher testified that in January 1993, he worked at his family's dry cleaning establishment in Oakley, which was located near entered Fernandez's Ike's Acme Club. Fisher saw Fernandez on almost a daily business, and was friendly with him. On the afternoon of January 14, Fisher entered Fernandez's bar to buy beer. Fisher observed Fernandez conversing over the bar with a man wearing a blue jumpsuit. Fisher testified that the man was defendant. Fisher saw no one else in the bar.

Fisher, who testified that Fernandez was "a gambling man," had just lost a bet with Fernandez. When Fisher offered to go "double or nothing," defendant interjected his opinion that people should pay their debts and "You shouldn't owe Lou any money." Feeling some tension in the air, Fisher bought a six-pack from Fernandez, and left the bar.

Fisher returned to the bar at approximately 6:00 p.m. to buy another six-pack. Defendant and Fernandez were still the only persons in the bar. According to Fisher, they were playing dice "as if they were gambling." Fisher testified that on the bar was "a dice cup, some money, and . . . beer bottles." When Fisher took the beer without tendering cash ("I don't know if I put it on credit or it was double or nothing for the bet"), defendant again "stuck his nose into it and . . . started talking about if you owe money, you . . . should pay." Fisher "definitely felt some tension" from defendant's demeanor: "like it was a big issue that I owed a little bit of money . . . . [I]t was pointed. Like, if you owe somebody money, you should pay them right now." Believing defendant was intoxicated, Fisher left.

Shortly after returning to his dry cleaners, Fisher heard a "loud boom," which he thought was a shot, or a car backfiring. Joined by a friend, Greg Browne, Fisher went out to the street to investigate, but saw nothing suspicious. A passerby believed he heard a pool cue hitting the floor or a gunshot the from inside the bar.

Several hours later, shortly after 8:00 p.m., a police officer entered the bar and found Fernandez on the floor, bleeding. Around the body were personal items. The cash register was open and coins were scattered nearby on the floor behind the bar. On the bar were dice cups, a beer bottle and a partially full glass. A pool cue and two metal rods had been inserted between the handles of the front door to prevent the doors from being opened. The jury heard evidence from which it could deduce that $535 was missing from the register, and $1,500-$2,000 was in the victim's missing wallet. Fernandez died from being shot in the chest and in the back of the head.

When Fisher learned of the shooting, he told his mother "I believe I saw the guy that did it" and would "never forget his face, that he had angry . . . blue eyes." Fisher provided a description to police. Over the next 10 months Fisher viewed more than a dozen photographic lineups, none of which depicted or involved defendant. Fisher never made an identification. However, at the last of the lineups Fisher told police "I'll know him when I see him."

Defendant's former wife testified that in January of 1993 defendant had access to numerous firearms, and commonly wore blue overalls at work. Shown a photograph of such coveralls, Fisher identified them as being "consistent" with those he saw defendant wearing in the bar. Defendant's former wife further testified that in early 1993 defendant's father was angry that a gun was missing from his home, and she heard defendant telling his father that he had pawned the gun in Reno. Finally, defendant's former wife testified that defendant would sometimes not go to work and spend his entire paycheck gambling.

Cory Cooper worked with defendant and considered him a good friend. In 1993, their employer required its employees to wear blue coveralls at the jobsite. (These were the same coveralls identified by Fisher as being worn by defendant in Fernandez's bar.)

At some time in the early 2000's, defendant told Cooper that a long time ago he had shot a man, and went on at length to describe the incident. The killing occurred in a bar in Oakley. The man was killed because he cheated defendant in a game of Liar's Dice. Defendant told Cooper that he had lost "his whole paycheck" gambling with the victim. More specifically, defendant told Cooper that, wearing his working coveralls, he took a .38 pistol into the bar. After spending "all afternoon [and] part of the morning" drinking and gambling with Fernandez, defendant recounted to Cooper what happened: "[h]e told me he waited until he was alone with him. Then he put a pool stick in the double doors [at the front entrance] and walked up behind the bartender and shot him in the head" while the bartender was next to the cash register. Defendant learned the bartender was still alive when he "rolled over . . . making gurgling sounds," at which point defendant "put another one in his chest." Defendant then "took his [the bartender's] money" and left.

Finally, according to Cooper, defendant said he went to Reno, where he pawned the gun, and gambled until "he was out of money." While in Reno, defendant noticed 'that he had his coveralls on and there was blood on them . . . [and] . . . he threw them in a trash can in a rest area on the way home" Defendant later retrieved the gun, which belonged to his father.

Eventually Cooper's friendship with defendant soured, and Cooper became scared of him. One incident Cooper remembered was a workplace confrontation where a screaming defendant pulled a gun. After another such incident, which led to police investigating Cooper's claim that defendant had vandalized Cooper's trucks and equipment, Cooper told one of the investigating officers that "I had proof of him doing something else that was illegal."

Some of this was corroborated by defendant's father, who, testifying for the prosecution, told the jury that defendant had access to a .38 pistol, and admitted taking it and pawning it in Reno. Defendant and his father went to Reno and redeemed the weapon.

A .38 revolver was seized in a 2010 search of defendant's father's house. Ballistics showed that it could have fired the bullets recovered from Fernandez's body. The bullets were nylon-coated, which largely neutralizes the individual barrel characteristics that permit precise matching of gun and cartridge.

Defendant's DNA was found on beer bottles recovered from the bar.

Defendant did not take the stand on his own behalf. He did call four witnesses: (1) a deputy sheriff, who testified that none of the fingerprints found in the bar were made by defendant; (2) a long-time employee of the firm that employed defendant and Cooper, who testified that it was company policy that workers' coveralls did not leave the jobsite; (3) Greg Browne, who testified that while with Fisher at the dry cleaners he never heard anything like a shot, and he and Fisher never went outside to look around ; and (4) Ralph Taliani, who testified that while he was in Fernandez's bar on the afternoon of the murder, he saw "two more guys down at the other end of the bar," and, after those two left, "I was the only one there after that."

REVIEW

We have altered the sequence of defendant's contentions, as presented in his opening brief, to conform to the chronological order in which the claimed errors occurred.

The Complaint Was Not Vindictively Amended To Add The Special Circumstance Allegation

The criminal complaint originally filed against defendant on April 26, 2010, had robbery and murder counts, but no special circumstance allegation. On May 6, represented by the public defender, defendant entered pleas of not guilty to the charges. On August 26, having arranged for private counsel (Anne Beles, who represented defendant at trial), defendant filed papers to substitute out the public defender. With barely two weeks knowledge of the case, Ms. Beles requested a continuance of the preliminary examination set for September 8.

That same day, August 26, the court started a morning hearing on the substitution. The prosecutor opposed the substitution because it would delay the preliminary examination. Ms. Beles told the court she was "not moving for a 1050 today [a reference to the Penal Code provision governing continuances]. I'm just moving to substitute in." When the hearing resumed in the afternoon, the prosecutor stated "I am handing the Court a notice of motion to file amended complaint with a request for an order shortening time so that that can be heard today. The motion to amend would be to add a special circumstance enhancement," which would preclude defendant getting bail (see Pen. Code, § 1270.5), something desired based "on concerns for public safety that were discussed in chambers." Concerning the proposed amendment, Ms. Beles opposed it because "I think that . . . the Prosecution is displeased with Mr. Byrns being out of custody. And I don't know what the basis is for the motion to amend the complaint with the special circumstance. The facts have not changed. There's not been any change of circumstance except that he bailed out." Over Ms. Beles's "vehement objection," defendant was then temporarily detained until the court made its final ruling on the motion to amend.

When the hearing resumed that afternoon, the court granted Ms. Beles's substitution motion, and then heard extensive argument. Eventually, the court agreed with the her that both "the custodial status issue and the motion to amend issue . . . are normally brought by motion with notice . . . [and] . . . should be brought in that way." Defendant was remanded "on a temporary basis," and the date for the preliminary was not changed.

The defense then filed motions to continue the preliminary examination; "bar amendment or dismiss complaint for retaliatory prosecution"; and "release defendant from custody." The prosecution filed its motion to amend the complaint.

All of the motions were heard on September 2. On that date, after argument, the court granted the prosecution's motion to amend, granted the defense motion to continue the preliminary examination, denied the defense motion for defendant's release, and

continued the motion to dismiss. The court set September 28 for "the retaliatory prosecution motion to dismiss," and to set the preliminary examination.

On September 28, the court (Hon. Claire Maier) conducted an evidentiary hearing because, as it told the prosecutor, "although there is not a presumption of vindictiveness . . . , there still can arise the question of whether or not that exists. Ms. Knox, I am certainly not going so far as to say that Ms. Beles has met a burden of presumed vindictiveness or that I am seeing that. The reason I wanted your testimony is because I have a question as to the timing. [¶] The timing does leave me with a couple of unanswered questions . . . which are left unanswered unless you make a record."

Ms. Knox then took the stand and testified as follows:

"When this case was originally filed by Mr. Cope . . . [h]e and I conferenced the case when he told me it was being assigned to me. He told me that he had filed the murder charge and the robbery charge initially on the Complaint; that he anticipated the defendant would be represented by the Public Defender's office; and that's why at this stage in the game we would not add the special circumstance.

"Terri Mockler was representing Mr. Byrns. I have nothing but respect for her talents. And Ms. Beles's suggestion that I was attempting to keep her from coming into the case is ludicrous at best. Terri Mockler is a very worthy adversary; and I think she's a very talented attorney; and she has far more experience than Ms. Beles does in these circumstances.

"However, that aside, once Ms. Beles called me to tell me she was substituting in, I told her that I had serious security concerns about witnesses in this case. And this was discussed in chambers with Judge Austin [on August 26] in some detail. And that would be the reason I would be objecting to her substituting in; that Ms. Mockler had agreed she would be prepared for preliminary hearing on September 8.

"But that aside, when we got to Delta Court and it appeared that Ms. Beles

would be substituting in, I had no idea if she was certified to do a death penalty case. So if Judge Austin were to grant the motion to allow her to substitute in and at preliminary hearing we added the special circumstance and she was not qualified to represent Mr. Byrns, we would be in a very difficult position.

"Also now it appeared that the Public Defender would no longer be representing Mr. Byrns pre-preliminary hearing or at preliminary hearing, the reasoning for not alleging the special circumstances in the first place no longer existed. And that was my reason for amending to charge the special circumstances."

On cross-examination by Ms. Beles, asked as to why she wished to add the special circumstance allegation, prosecutor Knox responded that she "had no idea whether you were certified to do a death penalty case," and that she (Knox) was not trying to prevent Beles from coming into the case. According to Ms. Knox: "if you were not certified to do a death penalty case and Judge Austin granted the motion to substitute you in, and we went to preliminary hearing and then I added the special circumstances, we would be in a position where Mr. Byrns would have the right to have basically another preliminary hearing if you were not certified to do a death penalty."

Ms. Knox testified that she made no attempt to ascertain whether Ms. Beles was certified to try a death penalty case, but that was irrelevant because "Prosecutorial discretion allows me to amend a complaint, information or indictment at any point in time up to the end of the presentation of the defense evidence at trial . . . ."

But there was another, more important, consideration: "I always had concerns about Mr. Byrns being out of custody. In fact—this was something I wasn't at liberty to discuss in Judge Austin's chambers—but the Sheriff's Office had put a tracker on the defendant's car to attempt to address security concerns.

"We had a witness who had not gone home for weeks; couldn't go into witness protection because of family considerations . . . . And he was basically

moving from place to place for weeks on end. And he is crucial to the People's case.

"So yes, having a homicide defendant out of custody—probably the first time it's ever happened—with a civilian witness that was crucial to the People's case definitely caused me concern," specifically "that Mr. Byrns, who has already committed a murder, would go out and kill the sole witness that could convict him of that murder." "[I]nterviews of friends and associates of Mr. Byrns . . . expressed concerns that he was violent and volatile." "[T]his civilian witness had become an informant and gone to the police and revealed Mr. Byrns' confession to the murder of Mr. Fernandez—Mr. Byrns did not become aware of that until after he went into custody and charges were filed against him."

Asked by Ms. Beles "Other than what has been stated here and in Judge Haynes's court [on September 2] and in Judge Austin's court, is there any other security concern," Ms. Knox replied: "You are presuming that my amendment was motivated solely by a desire to get Mr. Byrns back into custody. And that's not the case. I amended the Complaint to put you and the Court on notice that the People would potentially be seeking the death penalty against Mr. Byrns."

After hearing brief argument, the court ruled "I am not going to be granting this Motion to Dismiss." The court then explained: "[B]ecause there could have been one construction of the facts in the fashion that Ms. Beles characterized it, I did choose to ask for additional information from Ms. Knox. [¶] Once Ms. Knox testified, it's abundantly clear from her forthright and credible testimony that there is absolutely no connection to Ms. Beles substituting in and the choice to make the special allegation charging decision. Therefore I am denying the Motion to Dismiss."

The "presumption of vindictiveness" mentioned by Judge Maier arises when the prosecutor increases the criminal charge against a defendant under circumstances which are deemed to present a reasonable likelihood of vindictiveness. The relevant circumstance is the defendant exercising a legal right, be it constitutional or statutory. The presumption is not based on the subjective state of the individual prosecutor, and

does not imply that he or she individually harbors an improper motive. (*In re Bower* (1985) 38 Cal.3d 865, 876-877; *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 371; *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1546.)

There is no federal recognition of this presumption to pretrial charging decisions on the theory that "There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

"In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some 'burden' on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

". . . A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. . . . [T]he initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." (*United States v. Goodwin* (1982) 457 U.S. 368, 381-382, fns. omitted.)

California recognizes the force of this reasoning, but it has not absolutely closed the door on the possibility of pretrial vindictiveness. (See *People v. Michaels* (2002) 28 Cal.4th 486, 514-515 [noting that no "California case has done so"]; cf. *In re Bower*, *supra*, 38 Cal.3d 865, 876 ["California cases place great emphasis on when during the proceedings the prosecutor's allegedly vindictive action occurs "].) One Court of Appeal, considering the addition of a special circumstance allegation to a murder charge, went so far as to call the presumption "unworkable in the pretrial context." (*People v. Johnson* (1991) 233 Cal.App.3d 425, 447.) Another was even more emphatic, terming it "totally unworkable" to allow pretrial vindictiveness claims after a preliminary examination has been held. That Court of Appeal explained: "From the very commencement of proceedings, a criminal defendant has innumerable 'rights' which are exercised prior to and during the trial. *Whenever* the prosecution attempted to amend the information, the defendant could assert that the amendment was really in retaliation for some right that the defendant had theretofore exercised, or attempted to exercise. If the assertion of such a claim required the prosecution to come forward with explanations of the motivations for exercise of its discretion to amend the charges, the defendant could delay the proceedings and deflect them from the true issue, the defendant's guilt or innocence." (*People v. Farrow* (1982) 133 Cal.App.3d 147, 152, accord, *People v. Bracey*, *supra*, 21 Cal.App.4th 1532, 1547-1548.)

In addition, consideration must be taken of Penal Code section 1009, which allows a prosecutor to amend a complaint with leave of the court, so long as the amendment does not "charge an offense not shown by the evidence taken at the preliminary examination." If leave is granted, the decision is overturned only if it amounts to an abuse of the trial court's considerable discretion. (*People v. Miralrio* (2008) 167 Cal.App.4th 448, 458.) If pretrial vindictiveness claims were entertained, "a defendant could assert that retaliation was the motive for any amendment in the charges" (*People v. Johnson*, *supra*, 233 Cal.App.3d 425, 447), which would "significantly abridge prosecutorial charging discretion in a fashion inconsistent with statutory authority." (*People v. Hudson* (1989) 210 Cal.App.3d 784, 788.)

Here, of course, the preliminary examination had yet to be held. Nevertheless, we mention this statute because the prosecution's amendment request was inextricably linked to defendant's dismissal motion, and to his motion to continue the scheduled preliminary examination. Indeed, the proposed amendment was the direct cause for seeking dismissal. Reducing the scope of his objections, defendant no longer insists he was being penalized for asserting his right to bail, but only for "exercise of his right to counsel of his choice."

The record discloses no basis for overturning Judge Maier's denial of defendant's motion to dismiss. The matter was at a very early stage of the proceedings, when the prosecution could still be expected to be gathering and evaluating evidence. Certainly no decision should—or, we trust, does—receive as much sober reflection as one to invoke the most stringent sanction of the law. Defendant makes much of the prosecution always being aware that a murder had been committed, but this undoubted circumstance can hardly be used to preclude further evaluation of the offense. It is clear that Judge Maier accepted Ms. Knox's testimony that such further evaluation had indeed occurred, and was persuaded by Ms. Knox that there was an appreciable danger to defendant being released while constituting a danger to "the sole witness that could convict him of that murder." In light of all the circumstances, we see no abuse of discretion in allowing the amendment of the complaint. (*People v. Miralrio, supra*, 167 Cal.App.4th 448, 458.)

The Trial Court Did Not Err In Denying Defendant's Motion To Suppress Any Evidence Of Fisher's Identification As Tainted By An Unduly Suggestive Photo Line-Up

At the same time he filed his in limine motions for trial, defendant filed a motion for "suppression of any in or out of court eyewitness identifications of the defendant by Barry Fisher as being the product of unduly suggestive law enforcement procedures." In his moving papers, defendant explained why the line-up was impermissibly suggestive:

"Exhibit B is a color photographic lineup shown to Barry Fisher in 2010. There are six photographs of males with a number under each photograph. The copy . . . has a circle around the Number 2 position, presumably made by

witness Fisher. Defendant Byrns is depicted in Number 2. The other five males in the lineup do not appear similar to Defendant Byrns in a number of ways. The racial appearance of the others, the eye coloring of the others, the facial hair of the others and the clothing of the others all makes Byrns stand out.

"It is questionable whether or not all of the males in the photographic lineup are all 'white' or Caucasian males. Notably, Numbers 5 and 6 appear to be possibly of Latino descent. Defendant Byrns is clearly of Caucasian descent. This then narrows the possible identifications from 6 to 4.

"The ages of all the males in the lineup appear to vary greatly. While Numbers 1, 4 and 5 appear to be in the 20s, Number 3 appears to be over 40 years old. Numbers 2 (Byrns) and 6, appear to be approximately the same age. This, then, narrows the possible identifications consistent with Fisher's statement of [the suspect being] 30-35 years old, to only two people.

"The eye color of the males in the photographs is the most suggestive aspect of the lineup. Fisher described the individual as having blue eyes. Defendant Byrns is the only individual with readily identifiable light-colored eyes. It is arguable that Number 4 may also have dark blue eyes, but none of the others can be said to have blue eyes. This fact alone makes Byrns stand out and makes the identification procedure unduly suggestive.

"Byrns also is the only male with a mustache. Fisher did not mention a mustache or facial hair in his description to the Contra Costa Sheriffs in 1993. He did not mention it to the Walnut Creek officer who created the composite sketch. Fisher did not even mention a moustache to the detectives in the 2010 interview. However, the sheriffs chose to single out one man in the lineup by making him the only man in the lineup with a moustache. This unduly suggestive factor was borne out by Fisher's testimony in the trial. He identified Byrns in the lineup and though never mentioned before, attributed a moustache to the man he saw in the bar. Fisher, in fact, never mentioned facial hair to anyone until he was in front of the first jury. If the question for the Court is whether the lineup was

unduly suggestive, no better answer lies than when the witness himself adds on facts from the photograph of Defendant."

Defendant concluded: "The photographic lineup employed in the instant case was impermissibly suggestive due to Mr. Byrns unique eye color, the only thing the identifying witness seems particularly sure of, his race, age, facial hair, picture placement, and his bright yellow shirt. Mr. Byrns stands out. Accordingly, the pre-trial identification must be suppressed."

The trial court made its ruling at the in chambers resolution of the in limine motions. The court began by reciting the salient circumstances, evidencing a thorough familiarity with the papers, and the governing legal principles. We summarize those principles:

"[A] pretrial procedure will only be deemed unfair if it suggests in advance of a witness's identification the identity of the person suspected by the police. [Citation.] However, there is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance. [Citation.] Nor is the validity of a photographic lineup considered unconstitutional simply where one suspect's photograph is much more distinguishable from the others in the lineup. [Citations.]" (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.)

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.] [¶] The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] 'The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the

witness should select him.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.)

The court then stated its ruling:

"In my view the photo spread used in this case is not suggestive. As counsel acknowledges the witness, Mr. Fisher, was properly admonished before the photo spread was shown to him with the usual cautionary instructions.

"In reviewing the photo spread the question was not whether there are differences among the photos, I don't think one could put together a photo spread without differences, unless you used the same set of photos. The question is whether the photo spread suggests that the defendant should be picked out on some basis other than recognition that he is the perpetrator.

"In my view there is nothing in this photo spread that points to the defendant more than anyone else.

"The photo spread does contain six white male adults of similar general characteristics. I don't agree that any of the six appears to be Hispanic, just looking at the photos, that none of those—none of them appear to me to be Hispanic.

"The ages do vary from younger to older than the defendant, but there is a range within reason.

"The eyes in number two and number four, I agree with Ms. Beles those appear to be blue eyes. Mr. Byrns' eyes in number two appear to be the lighter of the two. But . . . eye color is fairly hard to see. The eyes are similar and typically just dark.

"I don't think that the law requires that a photo spread contain six photographs of blue eyed people in the same age as the defendant. I think that would be exacting too much from the investigative process.

"There is reference to the fact that the defendant is wearing a yellow shirt, which is true, but not particularly noticeable. It is only a small part of the collar that is shown, and again there are varying shirt colors in the photos and nothing

particularly striking about the yellow shirt.

"It is true that the defendant is—has a mustache and a light beard growth, and he is the one that has I would say the most prominent mustache of the six.

"Number five may have a mustache or just shadowing before his nose.

"Number six has kind of a 9:00 o'clock shadow I would say around his whole beard area. But I would note that a mustache is not, as defense points out, among the characteristics that Mr. Fisher has described prior to the photo spread by the person at the bar, so it's not something that would be suggestive of the person at the bar in itself. If anything, it would work against identifying the defendant based on the description Mr. Fisher gave.

"But just looking at the photo spread itself I don't find it to be unduly suggestive. There is nothing unnecessary about the process, it's not like a one-person show-up or a single-person photo spread where something inappropriately or unnecessarily suggestive was done. It is, in my view, a fairly standard and legitimate photo spread that meets the standards required.

"Therefore, under the legal analysis I have given that you don't get to the reliability question because there is no suggestibility, in my view, in the photo spread . . . ."

On appeal, the standard of independent review applies to a trial court decision that a pretrial identification procedure was not unduly suggestive. (*People v. Avila* (2009) 46 Cal.4th 680, 698-699.) Defendant essentially makes the same argument he did in the trial court, thinking that our de novo consideration will lead us to a different conclusion. It does not.

Several preliminary points warrant mention. First, as can be gathered from references in defendant's moving papers, this was the second trial; the first ended in a mistrial. The judge whose ruling we are reviewing, Honorable John W. Kennedy, did not preside at the first trial. Second, the record on this appeal does not include a reporter's transcript from the first trial, so we cannot verify defendant's characterization of Fisher's testimony at the first trial. Third, we do

have the photographic lineup (People's Exhibit 18), which we have carefully examined. That examination fully corroborates the descriptions recited by the trial court.

None of the photographs in the lineup has the quality of a Matthew Brady portrait. The lighting is uneven and the photographs are generally grainy. Still, we see no basis to disagree with the trial court's description of the men as Caucasian, not of Latin extraction. In fact, the poor quality of the photographs makes it a chancy business to assign colors to at least three of the six pictures. One of that three is Number 2, the one of defendant. Although defendant leans heavily on Fisher's distinctive light blue eyes, in photo Number 2, they could just as easily appear green. Numbers 1, 4, and 5 do appear to depict younger men, but the age differences are not conspicuous. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1217 ["All of the photographs were of Black males, generally of the same age"].)

Only one of the photographs, Number 5, depicts a man with hair of a style and amount conspicuously different from the other five. Although defendant's picture is the only one with a mustache, as the trial court noted that feature would be expected to divert Fisher' attention, not attract it. Even so, it does not demonstrate undue suggestiveness. (See *People v. Johnson*, *supra*, 3 Cal.4th 1183, 1217 ["differences in facial hair . . . [do] not make the lineup suggestive"].) The small amount of the yellow t-shirt he was wearing does not dominate the photograph or magnetize the viewer's gaze. As for what defendant termed "picture placement," our Supreme Court has noted, "no matter where in the array a defendant's photograph is placed, he can argue that its position is suggestive." (*Ibid.*)

Because we agree with the trial court that the lineup was not impermissibly suggestive, we also agree with the trial court's conclusion that there is no need to determine whether Fisher's identification was "nevertheless reliable." (*People v. Cunningham*, *supra*, 25 Cal.4th 926, 989.) Even if we were to assume, solely for purposes of this appeal, that the photographic lineup was unduly suggestive, that would not necessarily taint Fisher's in-court identification because he repeatedly testified that

his identification at trial was based on his memory of the man in Ike's Acme Bar on the afternoon of January 14, 1993. With such an independent source, Fisher's in-court identification could not be kept from the jury. (*People v. Ratliff* (1986) 41 Cal.3d 675, 689 ["While a defendant may attack any lineup, photographic or otherwise, as unduly suggestive [citation], the taint of an unlawful confrontation or lineup may be dispelled if the People show by clear and convincing evidence that the identification of the defendant had an independent origin."]; *People v. Martin* (1970) 2 Cal.3d 822, 831 ["the admission of an in-court identification which has a source or origin 'independent' of the illegal pretrial confrontation is not error"].)

The Trial Court Did Not Abuse Its Discretion In Denying Defendant's *Wheeler-Batson* Motion

In *People v. Wheeler*, *supra*, 22 Cal.3d 258, and then in *Batson v. Kentucky*, *supra*, 476 U.S. 79, the California and United States constitutions were construed to bar the use of race-based peremptory challenges. When a party protests that this prohibition is being violated, a well-established process is activated. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [challenges]. Third, 'if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the [challenges] has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162, 168.)

On the fourth day of jury selection, defense counsel advised the court that "I am bringing [a] *Batson-Wheeler* motion because I believe there is a prima facie case that the prosecution has systematically excluded African-American women." This is what ensued:

"Upon Ms. [M.'s] entrance into the box, I believe that the prosecution utilized . . . its next challenge on Ms. [M.], and upon Ms. [T.], an African-American woman . . . immediately upon her entry into the box.

"THE COURT: So, Ms. Knox, do you want to address the issue of whether there is a prima facie case?

"MS. KNOX: . . . [¶] . . . I don't believe that there has been a prima facie showing with regard to the exclusion of African-American women since I most definitely would not have excused the African-American woman that was excused by the defense.

"So I don't believe that a prima facie showing has been made that I am systematically excluding African-American females.

"THE COURT: Ms. Beles, anything further on the prima facie issue?

"MS. BELES: No.

"THE COURT: Okay. I do apply the standard of *Johnson v. California*, and that is whether the defendant has shown that based on the totality of relevant facts there is an inference of discriminatory purpose or whether the evidence is sufficient to permit a trial judge to draw an inference that discrimination is present.

"It is clear that African-American women are a . . . cognizable group and, therefore, the issue is ripe in the sense that the motion relates to a group that can be considered under *Batson* and *Wheeler*.

"Based on the totality of the circumstances I do not believe that a prima facie case has been shown as to the challenges to . . . two out of 17 jurors that the People have challenged . . . .

"In any event, having observed the pattern of challenges and the basis of any apparent potential reasons for challenging, I don't believe that there is a prima facie case that a discriminatory purpose has been underlying the People's challenge of the two jurors in question.

"So I'm going to deny the motion for lack of a prima facie showing. However, the People are permitted to place their reasons on the record if they choose to do so for purposes of appellate review.

"MS. KNOX: Your Honor, I believe that the jurors' answers to questions themselves would be ample basis for a legitimate exercising of a challenge. [¶] So I have nothing further to add to that record.

"THE COURT: Okay. So the *Batson/Wheeler* motion is denied."

Defendant contends we must overturn this ruling and remand for a new trial. When, as here, a trial court finds a defendant has failed to make a prima facie showing giving rise to an inference of discriminatory purpose, we "undertake an independent review of the record to decide 'the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race.' " (*People v. Taylor* (2010) 48 Cal.4th 574, 614.)

We start with the presumption that "a prosecutor uses peremptory challenges in a constitutional manner." (*People v. Williams* (2013) 56 Cal.4th 630, 649.) It was defendant's burden to rebut that presumption, a task that is exceptionally difficult when analyzing only two challenges. "While no prospective juror may be struck on improper grounds, we have found it ' "impossible," ' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears" (*People v. Garcia* (2011) 52 Cal.4th 706, 747 [three challenges]; see *People v. Bonilla* (2007) 41 Cal.4th 313, 342-343 & fn. 12 [two challenges]; *People v. Bell* (2007) 40 Cal.4th 582, 597-598 [two challenges]; *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189 [three challenges].) That is compounded because, apart from numbers, "defense counsel made no effort to discuss any other relevant circumstances, ' "such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions." ' " (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 504.) The difficulty is doubly compounded when, again as is the case here, the prosecutor did not state reasons for the challenges on the record.

"In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: '[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other

respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.' " (*People v. Bonilla*, *supra*, 41 Cal.4th 313, 342, quoting *People v. Wheeler*, *supra*, 22 Cal.3d 258, 280-281.)

The last of these factors is inapplicable because defendant is not African-American, and as best we can ascertain, Fernandez is not a member of the group to which the majority of the remaining jurors belong. The scope of voir dire was restricted and focused by the use of 14-page juror questionnaires. Moreover, most of the questioning was done by the court, further reducing the scope of the prosecutor's participation. In fact, having reviewed the four volumes of jury selection, we note that the prosecutor actually questioned fewer than half of the prospective jurors. In our independent review, apart from the very limited statistical support, there is insufficient evidence here to make out a prima facie case for a *Wheeler-Batson* violation.

"If the record suggests grounds upon which the prosecutor might reasonably have challenged the prospective jurors in question, we affirm." (*People v. Yeoman* (2003) 31 Cal.4th 93, 116.) Here, there is such a basis. Both of the two prospective jurors had been the victims of crimes that were not prosecuted. Experiences with law enforcement or the criminal justice system which, even if not adversarial or openly antagonistic, but merely less than positive, have long been accepted as a valid basis for a prosecutor's peremptory challenge, even if the jurors in question disclaim any bias. (*People v. Jordan* (2006) 146 Cal.App.4th 232, 257-258 and decisions cited.) Thus, there exists a separate basis for affirmance.

The Trial Court Did Not Let An Expert Testify Beyond The Scope Of Her Expertise

After testifying concerning her training and experience, Contra Costa Deputy Sheriff Criminalist Susan Swarner-Pullar detailed how she had qualified as an expert on "evidence collection and crime scene processing," "crime scene reconstruction," "hair analysis," and "blood spatter." The prosecution then offered her "as an expert witness in evidence collection, crime scene processing and reconstruction, hair analysis, blood spatter and deposition, blood volume and distribution and patterning." She was examined on her qualifications by the defense, who objected to her being accepted as an expert only on the subject of "hair analysis."

The trial court then told the jury: "I do find, ladies and gentlemen, that Ms. Pullar does qualify as an expert in the following fields:

"First, evidence collection.

"Second, crime scene processing and reconstruction.

"Third, hair analysis as distinguished from photocopies of hairs belonging to an individual person, but the analysis that she has described.

"Fourth, bloodstain pattern analyses, analysis with the subsections that she has described.

"And, fifth, wound patterning.

"So you may take testimony as expert testimony in each of those fields. As with all witnesses, you apply the weight that you deem appropriate."

During the ensuing direct examination, Swarner-Pullar testified as to what she found when she entered Ike's Acme Club on the evening of January 14, 1993. After some questioning about the blood she found, Swarner-Pullar was asked: "And based on the condition of Mr. Fernandez's body itself, as well as the blood patterns that you observed at the scene, do you have an opinion as to the sequence of wounds to Mr. Fernandez?

"A. Yes.

"MS. BELES [defense counsel]: I object to the opinion, Your Honor.

"THE COURT: I'm going to allow her to render her opinion, and the jury will evaluate the weight to apply to it, including cross-examination. But I think the opinion is within her scope of expertise so the objection is overruled.

"BY MS. KNOX [the prosecutor]: And what is your opinion as to the sequence of the wounds?

"A. I believe that Mr. Fernandez, the victim, was clearly shot in the back of the head first and then subsequent to that, after a period time, would have been shot in the chest.

"Q. And do you have an opinion as to whether or not Mr. Fernandez's body was moved between the shot to the back of his head and the shot to his chest?

"A. Yes.

"Q. And could you please describe for the jurors the sequence of wounds and the movement of Mr. Fernandez's body based upon what you observed on his body and there at the scene?

"MS. BELES: Objection. Improper phrasing.

"THE COURT: I'm not sure I understand the objection, but I understand Ms. Knox to be asking her to explain the basis for her conclusions that were just articulated based on her observations. With that understanding, I think it's an okay question."

Swarner-Pullar then testified that "The sequencing and the interpretation is based on the blood both on the victim's body and also on the floor near him and underneath him." Swarner-Pullar was well into her explanation when defense counsel objected "as narrative." The court responded: "Well, it's calling for an explanation that may be complex. I'm going to permit her to complete the answer to the question asked. So the objection is overruled."

Swarner-Pullar resumed her answer, which included the following:

"So it makes sense that Mr. Fernandez was shot in the back of the head and at some point was moved over to that location—rolled over in some way that the side of his face or portion of his head would create this wisping pattern once blood is collected,

which happens very quickly in head wounds because they bleed profusely, and would allow this large deposit of blood.

"And while in this position, you can see it in some of the photographs, there's no, what's called, respiratory types of patterns, expiration patterns. If a victim has blood in their mouth, it can be deposited on a surface as they sneeze or cough or breathe or do any of that. And there's no obvious indication of that on the wall at that point.

"But in order to have blood in their mouth, again, it goes to sequencing. If the person is shot in their head, unless the bullet penetrates through into their mouth and their nasal cavity, there would be no blood in that area. That blood comes from inside the chest or having created a wound that would allow that to go into their air passages."

At this point defense counsel objected and moved to strike the testimony "as pathological experience—pathology experience." The court replied: "Well, the jurors understand that Ms. Pullar is not testifying as a medical doctor but as a criminologist and will factor her experience in determining their evaluation, but I do think it's within the training that she's received. So I'm going to permit the testimony."

After Swarner-Pullar testified concerning how Fernandez's body "is rolled back into a supine position on his back, and that's where the majority of the blood then continues to leave his body underneath his head creating that large deposit," the prosecutor asked: "And the—given the location of the wound to Mr. Fernandez's chest, what would create the blood coming out of his mouth from that chest wound?" Swarner-Pullar answered: "Well, there is blood coming from the chest wound and then there is blood coming out of Mr. Fernandez—certainly out of his mouth and down both sides of his face. Again, gravity taking into effect. So he's lying on his back and it's going straight back instead of down, which would happen if he were in an upright position and blood was being forced out. And wounds to the chest cavity typically create that ability to have blood in your stomach or chest cavity or in your lungs. It just depends on the tract of that wound. But you often see blood being expelled from the mouth at this point." Defense counsel moved "to strike that testimony as medical expertise." The trial court overruled the objection, at which point defense counsel requested a "Standing

objection, Your Honor?" The court replied: "It depends on the question and answer. It is based on her observations that she's described of crime scenes and the training that she's received, but I don't know about future questions. I have to take it question by question."

Swarner-Pullar further testified about the "shattering" of hair caused by a gun shot: "Typically you see hair shattering with close—well, or—near distant gunshot wounds to a source of hair, like the back of the side of the head, something of that nature. So the target to muzzle distance has to be fairly small, fairly short." The prosecutor then asked "And can you estimate, please, what the distance would be?" After defense counsel made an "Outside the expertise" objection, the court and counsel had a discussion in chambers. When testimony resumed, the prosecutor established Swarner-Pullar's "education that you've received regarding the distance of a shattering event and a piece of hair." During the course of Swarner-Pullar's answers, the court sustained defense objections that part of one answer was nonresponsive and should be stricken, and also sustained a hearsay objection to another question. Before Swarner-Pullar concluded her direct examination, there was only one more objection by the defense, on the ground that a question called for speculation, which was partially sustained, "You can answer the question as to what you observed."

During redirect, the court overruled defense counsel's objection that a question about the circumstances where "burning of hair" would accompany "the shattering [of hair] phenomenon" was "outside the witness's expertise." The court sustained a defense objection that a question about whether "a burning muzzle imprint" was visible on a victim's skin "if there's a contact between the barrel of the gun and a person's skin" was "Outside . . . both cross—and area of expertise."

The above narrative demonstrates that defense counsel interposed a number of differing objections to testimony anticipated from Swarner-Pullar. Defendant has a more modest scope on appeal. To quote the caption of his brief: "The trial court committed reversible error when it permitted a criminalist to testify as an expert about the sequence in which the killer fired the two fatal gunshots because the criminalist's opinions exceeded the areas of expertise and they were impermissibly speculative."

As shown, the only objection interposed by the defense at the time was "I object to that opinion." This opaque expression was interpreted by the trial court as making the objection that Swarner-Pullar was being asked about a matter outside the scope of her accepted expertise. We will adopt this interpretation, meaning that the issue was preserved for review. (Evid. Code, § 353, subd. (a).)

Whether an expert witness is exceeding the scope of that expertise is a question committed to the trial court's discretion. (See *People v. Jones* (2012) 54 Cal.4th 1, 59.) Without objection from the defense, Swarner-Pullar had qualified as an expert in the areas of "crime scene . . . reconstruction," "bloodstain pattern analyses," and "wound patterning." These are broad areas, certainly broad enough collectively to encompass an opinion that was explained with the logic of blood flow. No abuse of discretion is shown.

There Was No *Griffin* Violation

Griffin v. California, *supra*, 380 U.S. 609 grew out of the Fifth Amendment's guarantee against self-incrimination. In *Griffin*, the United States Supreme Court invalidated a former provision of the California Constitution that permitted a prosecutor to comment upon a defendant's decision not to testify. "[C]omment on the refusal to testify . . . is a penalty . . . for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Id*. at p. 614.) According to our Supreme Court, *Griffin* "does not . . . extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. . . . [W]e have held that a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) So, what is prohibited is that the prosecutor "cannot refer to the absence of evidence that only the defendant's testimony could provide." (*People v. Brady* (2010) 50 Cal.4th 547, 565-566.)

Defendant contends that the prosecutor violated *Griffin* in closing argument. Defendant explains in his brief how this claim arose: "In its summation, the defense

argued to the jury that the discovery of appellant's DNA on two beer bottles in a recycling box at the bar where Louis Fernandez was killed did not prove that appellant was the killer, because appellant could have left the DNA in a visit to the bar a week or two before the homicide. This was based on testimony that the DNA could have been left on the bottles two weeks or even several years prior to the time the bottles were collected."

This is accurate. Defense counsel argued to the jury that "The DNA does not prove that Mr. Byrns killed Mr. Fernandez," "it just shows that Byrns was in the bar at some point in time" prior to the killing. From this counsel argued: "So there is [*sic*] two reasonable conclusions. One reasonable conclusion is that those beer bottles got Ed Byrns' DNA on there on the day of Louis Fernandez's killing. [¶] Another reasonable conclusion is that Ed Byrns was in that bar some time and had a beer or two and didn't kill Mr. Fernandez. . . . It is not unreasonable to believe that Mr. Byrns could have been in the bar without killing Mr. Fernandez."

The next step was the prosecutor's response, and what that response evoked in turn:

"[MS. KNOX]: Ms. Beles [defense counsel] talked about speculation, and said that the DNA evidence is susceptible of two reasonable interpretations, but it is only if you speculate. The only evidence in this case about when Ed Byrns was in Ike's Acme Club was at 12:00 o'clock on January 14 and after 6:00 p.m. on January 14, 19--

"MS. BELES: *Griffin*.

"THE COURT: Okay. You can argue the evidence that was presented, but I agree with the latter point that the limitations are what has been proven by the evidence.

"MS. KNOX: Through the testimony of Barry Fisher. Ed Byrns was in that bar at noon on January 14 and again after 6:00. And that is the only evidence.

MS. BELES: Objection, *Griffin*, Your Honor. [¶] I ask for an admonition.

"THE COURT: All right. I—again, you can argue the evidence that is presented, but not the evidence to the contrary on that point. [¶] The objection is sustained.

"MS. KNOX: Correct. [¶] Barry Fisher saw Mr. Byrns in the bar at noon and after 6:00 on January 14, 1993. And his DNA was found on the two beer bottles found in the bar sink behind the bar. That is the only evidence that has been presented in this courtroom.

"MS. BELES: Your Honor, I object under *Griffin*."

Following a discussion in chambers, the court told the jury: "[Y]ou have heard us say it many times, but it's important that you not lose track of this, that the burden is on the People at all times, the defendant does not have any obligation to present any evidence. And as you know the defendant has an absolute right . . . not to testify if he chooses not to. And you cannot hold that against him or reach any inferences as a result of his decision not to testify. [¶] We have said this since day one. I think you all understand the concept. It's important that you understand it in the context of the argument."

The issue thus boils down to whether "The only evidence in this case about when Ed Byrns was in Ike's Acme Club was at 12:00 o'clock on January 14 and after 6:00 p.m. on January 14" was "the testimony of Barry Fisher [who testified that] Ed Byrns was in that bar at noon on January 14 and again after 6:00. And that is the only evidence" amounts to an indirect comment on defendant's decision not to take the stand. We see no *Griffin* violation.

The prosecutor's comment was literally correct because Fisher's testimony was the only evidence putting defendant in Ike's Acme Club on the day Fernandez was murdered. This could only be an indirect comment on defendant's refusal to testify if defendant conceded he was in the bar on that date. Which, as shown from his counsel's argument, he never did. There was no express reference to defendant. (See *People v. Vargas* (1973) 9 Cal.3d 470, 476 [" '[t]here is absolutely no reference to the fact that defendant did not take the stand' "].) The prosecutor did not employ a word such as "denial" that "connotes a personal response by the accused himself." (*Ibid.*) Refuting the prosecutor's point would not necessarily require testimony from defendant; he could have produced someone else—a family member a friend, a coworker—to testify as to his

whereabouts on January 14, 1993. Thus, there was no *Griffin* error because this was not an instance when "contradiction or denial" of the prosecution's evidence "could be provided *only* by the defendant." (*People v. Bradford*, *supra*, 15 Cal.4th 1229, 1339.) Put another way, the prosecutor was only, if somewhat elliptically, commenting "upon the failure of the defense to introduce material evidence" (*ibid*.), another basis for establishing the absence of a *Griffin* violation.

The Minor Sentencing Errors Can Be Corrected On This Appeal

At the time he was sentenced to the life without parole term, defendant was ordered to pay $480 as a parole revocation restitution fine pursuant to Penal Code section 202.45. This fine is evidenced on the abstract of judgment for the indeterminate sentence. The parties agree that this fine must be stricken because "a parole revocation fine is inapplicable where there is no possibility of parole." (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 505.)

That same abstract shows that the four-year term imposed pursuant to former Penal Code section 12022.5, subdivision (a)(1) for the personal use enhancement is stayed, whereas the court ordered "the midterm of four years" was "to be served consecutively to the [life] sentence." Defendant agrees with the Attorney General that the abstract should be amended accordingly.

DISPOSITION

The judgment of conviction is modified by striking the $480 parole revocation restitution fine imposed pursuant to Penal Code section 1204.45. As so modified, the judgment is affirmed. The clerk of the trial court is directed to prepare an amended abstract of judgment for the indeterminate sentence in conformity with this opinion, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.